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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

VS.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD.
Appellees.

On Appeal from the Supreme Court of the State of California

~~**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND**~~

BRIEF OF BERKELEY PROPERTY OWNERS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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MOTION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

The Berkeley Property Owners' Association hereby moves the Court to file the attached *amicus curiae* brief for the reasons set forth below.

1. Interest of Amicus Curiae

Amicus Curiae, Berkeley Property Owners' Association, is comprised of approximately six hundred owners of rental property in Berkeley, California. Together, the members own approximately six thousand units of rental housing. For the most part, the members each own between 4 and 10 units of rental property.

Of all the *amici curiae* filing briefs in this case, members of the Berkeley Property Owners' Association are the most directly affected by the absence of competition which has resulted from the Berkeley Rent Stabilization. Its members are forced to

participate in the price control scheme imposed by the ordinance. Failure to participate is severely punished. Cumulative penalties for non-registration are imposed every sixty days. Owners who fail to register are denied the annual general increases permitted since 1980 and may not obtain individual adjustments permitted by the ordinance. Tenants of unregistered units are permitted to unilaterally withhold rents until registration is completed. Moreover, the owners' ability to sell their property is seriously crippled by the law's refusal to permit present buyers of residential rental property from using increased mortgage costs as a justification for obtaining permission to raise rents.

2. Counsel understands that general consents have been given for the filing of *amici curiae* briefs in this case.

Respectfully submitted:

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BRIEF ON THE MERITS

INTEREST OF *AMICUS CURIAE*

The interest of the Berkeley Property Owners' Association is set forth in the Motion to File *Amicus Curiae* Brief.

SUMMARY OF ARGUMENT

This significance of this case transcends questions about the proper application of the "state-action" doctrine, or the wisdom of rent control. The basic question presented is whether the Supremacy Clause of the United States Constitution, which binds every State judge to enforce the laws of the United States, should be enforced to strike down a local ordinance directly contravening a Congressional enactment and the national policy it embodies.

This Court will not resolve this appeal on a clean slate. Notwithstanding the state court's attempt to treat the question presented as unresolved by precedent, certain distinct, readily identifiable marks have been etched on the legal landscape. First, a national policy has been promulgated by Congress establishing a regime of free-competition, as essential to our economic freedoms as is the Bill of Rights to our personal liberties. *Community Communications Co. v. City of Boulder,* 455 U.S. 40, 56 n. 19 (1982), (hereinafter "*Boulder*"); *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 110-11, (1980), (hereinafter "*Midcal*"); and *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 398 n. 16, (1978), (hereinafter "*Lafayette*").

Second, the law's reach encompasses both actions taken by private parties and those taken by state or local government, whether through regulation or through operation of monopoly public service. The reach of the law, however, is modified in two respects, one affecting the entity whose action has failed to comport with national policy, and the other affecting the actual restraint imposed.

Thus, in order to accomodate the federalist structure of our Republic, not all state or local governmental anti-competitive action must fall before the pre-eminent national policy. Action taken by the State or by one of its subdivisions would not conflict with the Sherman Act when taken pursuant to a clearly articulated and affirmatively expressed State policy to displace competition with regulation or monopoly public service as sovereign *Boulder, supra,* 455 U.S., at 51; *Midcal, supra,* 445 U.S., at 105; *Lafayette, supra,* 435 U.S., at 414. And, where State or municipal *regulation* of private parties is involved, the State, as sovereign, must actively supervise the regulation, even where a clearly articulated state policy to displace competition exists. *Town of Hallie v. City of Eau Claire,* ___ U.S. ___, 105 S.Ct. 1713, 1720, n.10. Under this framework, our dual system of government, encompassing both State and National sovereignty, coexists with the pro-competition goal of the Sherman Act.

Application of the anti-trust laws is also affected by the type of restraint imposed. Certain restraints have been deemed invalid

per se, relieving the plaintiff from the burden of proving the actual effect of the restraint. Among those restraints which have been condemned out-of-hand, price-fixing has drawn the greatest ire because, in our system of economic freedom, freedom to set the price at which the product or service sells, is the linchpin.

Contrary to the state court opinion below, this classification rests on more than economic predictability and ease of judicial administration. It rests largely on our accumulated experience that price-fixing cripples the ability of those restrained to offer their product or service as they deem best. Moreover, to the extent the sellers' ability to engage in non-price competition is compromised by the level at which prices are set, the consumer's freedom of choice is significantly compressed. The Court has recognized that State and local governmental price-fixing, when falling beyond the parameters of the state-action exemption, is subject to the *per se* rule and must yield to the national policy of competition.

In *Rice v. Norman Williams Co.,* 458 U.S. 654, 661 (1982), Justice Rehnquist explained that if an ordnance or statute contemplated conduct which was illegal *per se* and if it "places irresistible pressure on a private party to violate the antitrust laws in order to comply," that ordinance will be condemned under § 1 of the Sherman Act. The ordinance challenged here does place such pressures on owners of residential rental property in Berkeley.

The opinion below, and no doubt the City and its *amici* will advise the court of the dire consequences of a decision invalidating the ordinance. These arguments were addressed by the cities of Lafayette and Boulder in their briefs to this Court and were rejected at that time. Asked to respond specifically to *Boulder,* Congress only removed the threat of damages.

The parade of horribles that the City will present in support of the ordinance must be considered in the context of the probable impact of a decision voiding the local law. This Court has repeatedly cautioned that anti-competitive effect alone will not suffice to void a local ordinance. See, e.g. *Rice v. Norman Williams Co., supra,* 458 U.S. at 659; *Exxon Corp. v. Governor of*

Maryland, 437 U.S. 117, 129-133. Hence, reversal of the California court's decision will not harken a return to the type of substantive due process analysis exemplified by *Lochner v. New York*, 198 U.S. 45 (1905). The ruling sought by Appellants would only void naked restraints on competition, such as price-fixing, when imposed by a local government acting in the absence of a clearly expressed and articulated State policy to displace competition.

This Court has not hesitated to enforce the Bill of Rights to void local ordinances which restrict the personal freedoms protected by our federal Constitution. When the antitrust laws—the Bill of Rights safeguarding our system of free competition—are contravened by local ordinances, the Supremacy Clause compels affirmance of the national will.

I

THE SUPREMACY OF THE NATIONAL POLICY OF FREE COMPETITION MUST BE REAFFIRMED IN THIS CASE

A. The Court Has Recognized The Threat Posed To The National Policy Of Free Competition By Restraints On Trade Imposed by Local Government

The Sherman Act embodies the *national* policy of free competition, a policy designed and enforced to benefit the citizens of every town and city in the land. That pre-eminent economic policy must not be permitted to be sacrificed on the altar of parochial interests which may arise from time to time to stifle free competition.

The opinion below paid remarkably little deference to this national policy and the effect of its holding on that policy. Absent from the decision was any reference whatever to Justice Brennan's concerns which, by *Boulder*, had earned the allegiance of a majority of the Court:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the

> armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.

435 U.S. at 408.

> In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

435 U.S. at 413.

> To permit municipalities to be shielded from the antitrust laws in such circumstances would impair the goals Congress sought to achieve by those laws, . . . without furthering the policy underlying the *Parker* "exemption."

435 U.S. at 415.

In each case comprising the recent state-action trilogy of *Boulder*, *Midcal* and *Lafayette*, the Court has emphasized that "Antitrust laws . . . are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms[,]" quoting *United States v. Topco Associates*, 405 U.S. 596, 610 (1972). *Boulder*, 455 U.S. at 56 n. 19; *Midcal* 445, U.S., at 110-11; *Lafayette*, 435 U.S., at 398 n. 16.

In reviewing local ordinances, this Court has shouldered the obligation of striking down acts of local government which restrict personal freedoms guaranteed by the Constitution or Congressional enactment. Thus, in furthering the national policy of free speech and expression, the Court has struck down restrictions on campaign financing which violated the national policies of free speech encouraging political debate; *Citizens Against Rent Control v. City of Berkeley* 454 U.S. 290 (1981); voided restrictions on soliciting on behalf of political—as opposed to charitable causes, *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); invalidated ordinances requiring licenses to speak, *Lovell v. Griffin*, 303 U.S. 444 (1938); and struck down ordinances which, through ostensibly aimed at litter-

ing, actually prohibited distribution of handbills, *Schneider v. State,* 308 U.S. 147 (1939).

If, as this Court has recognized, the antitrust laws are as vital to free trade in commerce as the first amendment is to free trade in ideas, the Supremacy Clause requires that ordinances which directly conflict with the national policy embodied in the Sherman Act must yield to Congress' mandate.

B. The Ordinance At Issue Directly Restrains Trade And Thus Conflicts With The National Policy Of Free Competition Codified In The Sherman Act

This Court has repeatedly held that when local law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' " the doctrine of pre-emption compels invalidation of the local law. *Michigan Canners & Freezers v. Agricultural Marketing & Bargaining Bd.,* ___ U.S. ___, 104 S.Ct. 2518, 2523 (1984) [citation omitted]. "The underlying rationale of the pre-emption doctrine, as stated more than a century and a half ago, is that the Supremacy Clause invalidates state laws that 'interfere with or are contrary to, the laws of congress.' *Gibson v. Ogden,* 9 Wheat 1, 211 (1824)." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 317 (1981). Thus, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of the Constitution provided that the federal law must prevail.' *Free v. Bland,* 369 U.S. 663, 666." *Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta,* 458 U.S. 141, 153.

Justice Rehnquist's discussion of the pre-emption doctrine in the antitrust context in *Rice v. Norman Williams, supra,* should have put to rest the notion that local governmental action amounting to a *per se* violation of the antitrust laws will survive this Court's scrutiny.

> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation.

458 U.S. at 659, 661.

1. The Ordinance Establishes A Pervasive Price Fixing Scheme, A Per Se Violation of The Sherman Act

The ordinance must be examined in the light cast by numerous decisions in which this Court "has not wavered in [its] enforcement of the *per se* rule against price fixing," recognizing that the rule "is grounded on faith in price competition as a market force and not on a policy of low selling prices at the price of eliminating competition." *Arizona v. Maricopa County Medical Society, supra,* 457 U.S. at 348. [citation omitted].

Examining the ordinance to determine whether a conflict exists, we find that the ordinance does, in fact, mandate the elimination of price competition among owners of rental property. Prices are strictly regimented. Once each year, pursuant to section 11, the Board authorizes a general increase applicable to all owners for the forthcoming year. Regulation 1103 et seq. Section 12 allows owners to seek individual rent increases. The incentive to seek such increases is dampened considerably by the regulations, however. Regulation 1274 limits any monthly increase to the lesser of 15 percent or $50.00 per calendar year per unit. On the other hand, an owner must pay the Board a filing fee of $120.00 for the first unit and $60.00 for each additional unit for which an increase is sought. Regulation 1203. The legal costs of preparing the petition are not recoverable. Regulation 1265 (4).

Other disincentives to rent adjustments also exist. The Regulations presume that the actual profit realized in 1979 resulted in a fair return for the owner. No allowance for inflation is made. Regulations 1264, 1265, 1275. Mortgage principal and interest payments are *not* to be considered in computing the net operating income. (Regulation 1265) except that increases in debt service may be considered if sustained during the period 1978-1980. Regulation 1276.

Although rent increases are permitted for capital improvements, no incentive exists to make such improvements. The increases are limited to the actual cost of the improvement plus imputed interest over an amortization period set by the Board. At the end of that period, the rent must be reduced by the amount of the increase allowed to offset the cost of the improvement. The owner is not permitted to earn a profit on that improvement. Regulation 1267.

Perhaps, the greatest impediment to price adjustments, however, is revealed by reading the current ordinance with its predecessors, Measure I and Ordinance 5212. Measure I was enacted in November, 1978 and required owners to lower rents to reflect property tax savings resulting from the passage of California's Proposition 13 the prior June. Ordinance 5212, enacted in November, 1979, limited increases to five percent pending the enactment of the present law which was enacted in June, 1980. These laws were self-enforcing; there was no municipal board established until the summer of 1980.

As the ordinance is presently applied by the Board, owners are only allowed to take advantage of the Section 11 general adjustments and Section 12 individual adjustments if the current rent charged is in compliance with the ordinance. Because the current ordinance, however, incorporates the 1978 and 1979 laws, the many owners who failed to reduce rents in 1979 were not permitted to take advantage of the general adjustments allowed by the Board commencing in 1981. For those owners who failed to lower rents in 1979, the amount which should have been charged in 1979 under Measure I becomes the permanent legal rent in perpetuity until refunds are made of *all* sums collected above that amount. No statute of limitations has been applied. Even after refunds are made, the rent is fixed at the 1979 level; only general adjustments enacted by the Board subsequent to the date of that refund may be taken. Hence, owners who did not reduce rents in 1979 are permanently barred from recouping the annual adjustments allowed prior to the refund. For many units in Berkeley, the present legal rent is that which should have been set in 1979.

In addition to the price fixing, the ordinance severely restrains the purchase and sale of rental property. Regulation 1276 pre-

vents one who purchased Berkeley rental property after June, 1980 from recouping through increased rent the difference between the prior and current mortgage payments. Even if the prior owner held the property free and clear, the new owner is barred from treating the mortgage payments as an expense. Section 12 (d), (e); Regulation 1276. Ostensibly designed to thwart speculation, these provisions basically preclude the purchase and sale of rental property in Berkeley.

2. Berkeley's Rental Property Owners Are Compelled To Participate In The Price Fixing Scheme

Justice Rehnquist's pre-emption analysis would also void ordinances if "irresistible pressure is placed on a private party to violate the antitrust laws in order to comply with the [ordinance]." *Rice v. Norman Williams' supra,* 458 U.S. at 661. Such pressure exists here. Section 8 of the ordinance requires all owners to register, setting forth the rental history of each unit on the property since June 6, 1978 (two years before the law was enacted) as well as other information. This apparently innocuous provision is the cement which binds the owner to the price-fixing scheme.

Each year the Rent Stabilization Board authorizes an across-the-board percentage increase for all units in the city. Section 11. Owners who fail to register are not entitled to these increases. If such increases are taken by an unregistered owner, they will be forfeited by the Board in response to a tenant's petition. To further ensure registration, owners are barred from obtaining individual rent adjustments if they have not registered. Section 12.

In addition, a tenant of an unregistered owner may withhold his entire rent until the rental unit is registered in accordance with the law. Section 15(a)(2).

Hence, owners of unregistered units are forced, under the threat of massive rollbacks, to maintain their rents at the pre-rent control level. Owners of registered units are forced to toe the line and limit their increases to those allowed by the Board. Their registration statements will reveal any inconsistency, subjecting them to rent withholding and refund orders.

Most significantly perhaps, failure to register permits the tenant to successfully resist any unlawful detainer action, regardless of its basis (non-payment of rent; destruction of property; material violation of the lease) on the ground that the owner has not complied with the registration provisions of the ordinance. Section 13(c).

Penalties are also imposed on owners of unregistered units. Under Section 8, the registration fee—paid only by the owner—must be paid by September 1 of each year. That fee for 1985-1986 has been doubled to $60.00 per unit per year. In the event the owner fails to pay, an amount equal to the fee is added to his bill every sixty days.

This brief review of the ordinance compels the finding that irresistible pressure is indeed placed on rental property owners to participate in the price fixing scheme under review.

II

THE CALIFORNIA COURT'S ARGUMENTS ADVANCED TO JUSTIFY OVERRULING THIS COURT'S DECISIONS, WHICH HAVE PLACED MUNICIPAL CONDUCT WITHIN THE REACH OF THE SHERMAN ACT AND HAVE CONDEMNED PRICE-FIXING AS *PER SE* ILLEGAL, SIMPLY REITERATED ARGUMENTS HERETOFORE REJECTED BY THIS COURT AND CONGRESS

In *Boulder,* this Court granted a Petition for Certiorari to reverse a decision rendered by the majority of a federal court of appeals which had seemed intent on overruling this Court's *Lafayette* decision. *Community Communications Co. v. City of Boulder,* 630 F.2d 704 (10th Cir. 1980). Although explicitly recognizing that "we are here concerned with City action in the absence of any regulation whatever by the State of Colorado." 630 F.2d at 707, the Tenth Circuit nevertheless held that a state policy to displace competition existed. And, notwithstanding the *Lafayette* plurality's rejection of the governmental-proprietary dichotomy, the Tenth Circuit majority held that *Lafayette* only applied to proprietary conduct.

Here, the California Supreme Court has, in effect, followed the Tenth Circuit's refusal to heed this Court's precedents. The length of its opinion reflects the extent to which the majority below was required to go to negate this Court's prior teachings.

The state court decision explicitly recognized this Court's rejection of the governmental-proprietary dichotomy. Nonetheless, it fashioned a test which, in effect, automatically exempted from successful attack all local health and welfare ordinances debatably related to the legitimate exercise of the police power. 209 Cal.Rptr. at 707-708, 709.[1]

A. The Cities Of Lafayette And Boulder Raised The Precise Arguments Employed By The Court Below In Rejecting The Application Of The Sherman Act To Regulatory Action. This Court Rejected Those Arguments Then And Must Do So Again

The opinion below essentially reiterated arguments previously rejected by both this Court and Congress. In *Lafayette* and *Boulder* this Court explicitly rejected the very same contentions that the antitrust laws and municipal regulation could not coexist.

The cities in *Lafayette* argued that antitrust liability "will have a chilling effect upon local decision-making and paralyze the functions of local government." Pet. Brf. No. 76-864 at 7. Although forcefully reargued in Justice Stewart's dissent (435

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[1] The two exceptions to this test are illusory. First, ordinances which are improperly motivated or the product of official misconduct or conflict of interest are actionable. Even absent the Sherman Act, however, local legislation can be voided on proof of misconduct and conflict of interest. Second, while the opinion states that anti-competitive ordinances may be overturned if the plaintiff demonstrates that the city's purposes could be achieved as effectively by means less intrusive on federal antitrust policies (213 Cal.Rptr. at 707-708), it appears that if such a showing can be made only through the introduction of extensive evidence at trial, the ordinance will be upheld and an evidentiary hearing precluded. Thus, finding that plaintiffs in the instant case would require such a showing, the Court summarily upheld the ordinance. 209 Cal.Rptr. at 709.

U.S. at 397-400), this contention failed to carry a majority of the Court and was specifically rejected by the plurality opinion. 435 U.S. at 416-417.

The City of Boulder and its *amici* repeated Justice Stewart's concerns in their briefs to the Court. Foreshadowing the specific points the California court would raise several years later, Boulder argued that reversal of the Tenth Circuit decision would "Force federal courts who strictly apply the Sherman Act to enjoin legitimate local governmental regulation." Resp. Br. No. 80-1350, at 37. The City also contended that "subjecting cities to judicial antitrust review would effectively turn back the clock to the era of substantive due process when every legislative act of government was subjected to endless economic 'hair-splitting' by the federal courts." *Id.* at 37 n.39. Finally, the city noted that other remedies were available to challenge wrongful municipal conduct, noting that unauthorized or criminal conduct is actionable. *Id.* at 38 n.42.

A majority of the Court rejected the argument:

> Respondents argue that denial of the *Parker* exemption in the present case will have serious adverse consequences for cities, and will unduly burden the federal courts. But this argument is simply an attack upon the wisdom of the long-standing congressional commitment to the policy of free markets and open competition embodied in the antitrust laws.

455 U.S. at 56.

B. The Arguments Advanced By The Court Below Were Raised By Local Government Advocates Before Congressional Committees. Congress' Refusal To Adopt Those Points Should Be Respected

When parties have disputed this Court's statutory construction, they have been advised to seek help in the halls of Congess. Thus, in *Arizona v. Maricopa County Medical Society, supra,* the Court advised the unsuccessful defendants that their "arguments against application of the *per se* rule in this case therefore are better directed to the Legislature. Congress may consider the exception

that we are not free to read into the statute." 457 U.S. at 354-355 *Cf. Texas Industries v. Radcliffe Materials,* 451 U.S. 630 (1981)

Following this advice, local governments and their allies lobbied for legislation modifying the *Boulder* decision. As the House Judiciary Report (No. 98-965) reveals, however, local governments sought much more than relief from the threat of money damages. Several witnesses before the committee argued that the rule of reason was "entirely inappropriate in the context of municipal conduct where there is every reason to anticipate that a local government defendant may have acted for reasons of the public health, safety and welfare." H. Rept. 98-965 at 16. Testimony was also received urging abolition of the *per se* rule in the municipal antitrust context. *Id.* at 16 n. 25.

Six bills were introduced in the 98th Congress addressing the subject of municipal antitrust liability. Two of the proposals were remarkably similar to the test adopted by the court below. Under H.R. 3688, a court would have determined whether the local government's objective could have been achieved in a manner less restrictive of the Federal interest in competition. *Id.* at 16. Under another proposal, H.R. 5992, the antitrust laws would not have applied to actions of local government "reasonably undertaken to protect or provide for the public health, safety or welfare." *Id.* at 17.

Neither of these proposals was enacted; Congress limited its modification of *Lafayette* and *Boulder* to the question of damages, limiting plaintiffs to injunctive relief. Local Government Antitrust Act P.L. 98-544. Congress' refusal to further modify *Boulder* and *Lafayette* should be viewed as a ratification of this Court's holdings and, therefore, respected. *Laird v. Nelms,* 406 U.S. 797, 802 (1972).

C. The California Supreme Court Unilaterally Amended The Sherman Act By Making Legislative Proposals Rejected By The Congress Applicable to California Municipalities

Undaunted by Congress' refusal to alter the substantive holdings of *Lafayette* and *Boulder,* the California Supreme Court, in effect, enacted the very legislation Congress had rejected. Under the banner of protecting local legislative action from judicial

interference, the state court invaded the province of the national legislature and amended the Sherman Act as it applied to California citizens allegedly harmed by local government anti-competitive conduct.

Adopting the doctrine that municipal government can do no wrong, the court below stole a page from John Calhoun's nullification theory and declared that at least one act of the national legislature shall have no effect in California. In effect, this decision did no less than violate both the Supremacy Clause and Article IV, Section 2 which states, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several States." Neither the State of California nor the residents of Berkeley have seceded from the Union. The economic liberties protected by the Sherman Act belong to them as well.

III

THE COURT IS OBLIGED TO ENFORCE THE NATIONAL POLICY OF FREE COMPETITION. THE FEAR THAT SUBSTANTIVE DUE PROCESS WILL BE RESURRECTED BY A DECISION INVALIDATING BERKELEY'S LAW IS UNWARRANTED

The fear of a return to *Lochner* era judicial interference with local regulation is unwarranted. We deal not with the amorphous due process clause of the Fourteenth Amendment. Rather, the Court in this case is asked to strike down a price fixing scheme which runs directly counter to decades of judicial decisions applying a Congressional enactment.

The effect of the price fixing parallels the effect of a private agreement. Prices are fixed so low that owners can provide only minimal services to renters and an owner's ability to tailor his property to the needs of renters, who may be willing to spend more than the rates set by the Board, is eliminated. Like the Arizona doctors described in *Arizona v. Maricopa Medical Society, supra*, owners who pay special attention to their properties are not rewarded for their extra efforts which, while often intangible, make a particular rental property distinctive. Small owners, who have relied on personal service, and often deferred increases prior

to rent control, find rents basically frozen and cannot remain in the market.

The state court opinion maintains that nothing suggests that the price control on Berkeley will be permanent, noting that may cease when the vacancy level exceeds 5%. Section 6q. This assumes that Berkeley's tenants, prospering under rent control, will voluntarily decide to abandon it. The conclusion also ignores the fact that price control invariably limits market entry and causes some in the market to withdraw, thereby guaranteeing a low vacancy rate for the indeterminate future.

In *Owen v. City of Independence,* 445 U.S. 622, 649 (1980), the Court explained its role in reviewing laws which allegedly violate the federal Constitution or statutes:

> But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the City's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.

Lines must be drawn somewhere. Limitations exist on the extent to which personal freedoms may be constricted by local government action and this Court has developed tests for judging suspect ordinances. Thus, in free speech cases, laws which directly restrain speech because of the content of that speech are deemed *per se* illegal; no balancing is done, the law is voided. *cf. Cohen v. California,* 403 U.S. 15 (1971); *Near v. Minnesota,* 283 U.S. 697 (1930).

Price fixing in the economic sphere is analogous to such content-based direct restraints on speech. Price fixing is voided without any balancing whatever. The *Lochner* problem is in reality the product of the state court's own test. Unwilling to apply the antitrust laws as they have been interpreted to date, the opinion below discarded the *per se* rule and substituted a

standardless test which invited the very second-guessing the opinion attacked.

The court's opinion below was also predicated on the belief that any egregious fault with the law could be solved in the voting booth. The *Lafayette* plurality expressly rejected the view that the political process is an adequate safeguard against the enactment of parochial anti-competitive economic policy by local government acting in the absence of state policy. Since Berkeley's residents, by virtue of their membership in the National Union, have been granted the rights of free competition, those rights should not be subject to deprivation by majority vote at the local level.

IV

IN THE EVENT THE COURT DETERMINES THAT THE *PER SE* RULE IS INAPPLICABLE, IT SHOULD FASHION A TEST REQUIRING THE CITY TO PROVE THAT ITS ORDINANCE IS THE LEAST RESTRICTIVE MEANS OF ACCOMPLISHING ITS ENDS

If the Court concludes that a *per se* test is not the proper vehicle to judge alleged municipal violations of the antitrust laws, we submit that the Court should adopt the test employed for non-content based restrictions in first amendment jurisprudence. Under this test, the local government would bear the evidentiary burden of proving that its restraint on competition was the least restrictive means of furthering a significant governmental interest. *See, e.g. Village of Schaumberg v. Citizens for a Better Environment,* 444 U.S. 620 (1980). Because economic freedoms of such national significance are involved, it is crucial that strict scrutiny be applied to such ordinances and the burden be placed on the city to justify its restraint.

Furthermore, and just as critical, the right to challenge a governmentally imposed direct restraint should not be limited to a facial challenge mounted contemporaneously with the law's enactment. Those challenging the ordinance must be given the opportunity, if they desire it, to wait until the actual anti-competitive effect of the restraint becomes visible. Limiting

challenges to facial attacks on the law will preclude any inquiry into its actual enforcement.

CONCLUSION

The citizens of Berkeley have the right to enjoy the fruits of free competition which are guaranteed them by the Sherman Act. Ostensibly acting to preserve the separation of powers between the judiciary and local legislature, the California Supreme Court has invaded the province of the Congress and nullified any application of the Sherman Act to California municipalities. Decrying second-guessing of legislative decrees, the court below substituted its own judgment for that of the national legislature. Restoring the proper balance between Berkeley's law-makers and the Congress and restoring to Berkeley's citizens the economic freedoms which the Sherman Act protects, mandates a decision enjoining the further enforcement of Berkeley's Rent Stabilization Ordinance.

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